United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

75-4151

To be argued by: Anna M. Durbin

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-4151

REYES FRIAS DELEON,

Petitioner,

-vs-

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

B
P/S

ON PETITION FOR REVIEW FROM

THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR PETITIONER

Judith M. Mears
Dennis E. Curtis
Stephen Wizner
Mary F. Keller
127 Wall Street
New Haven, Connecticut 06520

Michael J. Churgin
2500 Red River
Austin, Texas 78705

Attorneys for Petitioner

On the brief:

Anna M. Durbin
Yale Law School
Class of 1976

UNITED STATES COURT OF APPEALS

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REYES FRIAS DELEON,

Petitioner,

-vs- Docket No. 75-4151

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

State of New York)
) ss.: Elmhurst, April 30, 1975
County of Queens)

I, REYES FRIAS DELEON, being first duly sworn according to law, depose and say:

1. That I am the petitioner in the above-entitled petition for review.

2. That I consent to the appearance of Ms. Anna M. Durbin, Yale Law Student and member of the Yale Danbury Project, to present oral argument on my behalf in the above-entitled petition for review.

Reyes Frias Deleon

Sworn and subscribed to before me this
30th day of April, 1975.

PETER BEGHIN
NOTARY PUBLIC, State of New York
No. 41-0223700 - Queens County
Filed in New York & Nassau Co.
Expires March 30, 1977

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MISCELLANEOUS

UNITED STATES COURT OF APPEALS

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Docket No. 75-4151

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-vs-

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Respondent.

PETITION FOR REVIEW

FROM THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR PETITIONER

STATEMENT OF THE CASE

Reyes Frias Deleon, petitions for review of the decision of the Board of Immigration Appeals denying him relief from an order of deportation. This court has jurisdiction pursuant to 8 U.S.C. §1105a.

An Order to Show Cause charging that Mr. Frias was deportable pursuant to Sections 241(a)(1) and 212(a)(20) of the Immigration and Nationality Act (hereinafter Act) (8 U.S.C. §§1251(a)(1), 1182(a)(20)), was issued on July 17, 1973. On August 26, 1974, the Service issued a Superseding Order to Show Cause charging that Mr. Frias was subject to deportation pursuant to Section 241(a)(5) of the Act (8 U.S.C. §1251(a)(5)), because he had been convicted under 18 U.S.C. §1546 for fraudulent use of entry documents.

On October 10, 1974, Mr. Frias appeared with counsel before Immigration Judge Francis S. Lyons at Danbury Federal Correctional Institution for a deportation hearing. Judge Lyons entered on the record the original order to show cause as Exhibit A (Adm. Rec. No. 25; Transcript of Hearing, Adm. Rec. No. 21, at 1) and the superseding order as Exhibit 1. (Adm. Rec. No. 24; Transcript of Hearing, Adm. Rec. No. 21, at 1). The indictment of Mr. Frias was entered as Exhibit 2 (Adm. Rec. No. 23; Transcript No. 21, at 3).[1/]

Mr. Frias did not concede his deportability at this hearing, but submitted a Motion to Dismiss Deportation Proceedings with Prejudice with supporting Memorandum and documents asserting that Section 241(f) of the Act precluded his deportation. (Adm. Rec. No. 18, 19, and 20). He also submitted an Application for Withholding of Deportation for Reason of Political Persecution pursuant to Section 243(h) of the Act (Adm. Rec. No. 16). Mr. Frias swore to the truth of the facts set out in his application, and the hearing was adjourned to consider the applications.

On October 29, 1974, Mr. Frias was paroled from Danbury to his Immigration Detainer, and on November 11, 1974, the deportation hearing was reopened in New York for the taking of testimony on the 243(h) Persecution Application. Mr. Frias proceeded in forma pauperis. (Adm. Rec. No. 14 and 17).

On December 20, 1974, the hearing was again reopened to include in the record a letter from the Office of Refugee and Migration Affairs of the Department of State which denied any claim for asylum.[2/]

[1/] Erroneously labelled in the Index to the Administrative Record as "Transcript of Conviction."

[2/] Mr. Frias, however, had not made a claim for asylum. (INS Form I-589). Such a claim is entirely separate from an application for withholding of

(cont'd on next page)

Judge Lyons denied both the 241(f) and the 243(h) claims in an opinion issued December 20, 1974 (Adm. Rec. No. 11).

Mr. Frias filed a notice of appeal to the Board of Immigration Appeals on December 30, 1974 (Adm. Rec. No. (8 and) 10). After hearing oral argument on February 26, 1975 (Adm. Rec. No. 5), and receiving a brief from Mr. Frias (Adm. Rec. No. 4), the Board issued an order on July 10, 1975, dismissing the appeal. (Adm. Rec. No. 3).

The Board of Immigration appeals rejected Mr. Frias' claim that his deportation was precluded by Section 241(f). In so doing, the Board stated that the basis for Mr. Frias' conviction was a "false claim to citizenship" at the time of entry. There was no support for this premise in the record before the Board. The indictment states that Mr. Frias' conviction was based on his impersonating Rafiel Lara Ortiz, who is a permanent resident alien. That Mr. Frias did not enter under (nor was he convicted of) a "false claim to citizenship" was repeatedly emphasized by his counsel, and was not contradicted or disputed by counsel for the Service. (Adm. Rec. No. 4, at 2; Adm. Rec. No. 5, at 6).

The Board neither approved nor rejected Mr. Frias' 243(h) claim for withholding of deportation which asserted he would face political persecution if he were deported to the Dominican Republic. Although Mr. Frias included the 243(h) claim in his Notice of Appeal to the Board (Adm. Rec. No. 10),

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2/ (footnote 2 cont'd) deportation under §243(h), which is the claim Mr. Frias made. An asylum claim depends, not on the statute, but on the international Protocol Relating to the Status of Refugees of 1967, to which the United States became a party effective Nov. 1. 1968. Perhaps recognizing this distinction, Judge Lyons disavowed reliance on the State Department letter (Adm. Rec. No. 11, at 5). See 8 C.F.R., Part 108.

argued it (Adm. Rec. No. 5, at 2-6) and briefed it, (Adm. Rec. No. 4, at 8-11) the Board failed to mention the claim in its opinion dismissing the appeal.

Counsel for Mr. Frias received the Board's order on July 21, 1975. A petition for review by this court was filed that same day.[3/] Despite the mandatory 40-day language of Rule 17(a) of the Federal Rules of Appellate Procedure, the Service did not file the administrative record in this case until after a scheduling order issued on December 8, 1975.

[3/] Service of notice of the petition for review effected an automatic stay of Mr. Frias' deportation. 8 U.S.C. §1105a. Counsel for Respondent asserted to Petitioner's counsel that Mr. Frias' petition would not be "filed" until after a hearing on his motion for leave to proceed in forma pauperis, scheduled for August 12, 1975. The Assistant U.S. Attorney contended that service of the notice of filing was therefore insufficient and Mr. Frias would be deported before his hearing in this Court, thus possibly undermining this Court's jurisdiction. See 8 U.S.C. §1105a(a)(3) and (c). Mr. Frias borrowed $50 to pay the filing fee to prevent imminent deportation, which the Service had carried out on another of his counsel's clients. See Guerrier v. I.N.S., petition pending No. 75-4034 (2d Cir., Filed Feb. 18, 1975), (Adm. Rec. No. 5, at 10-11).

STATEMENT OF FACTS

Reyes Frias DeLeon is a native and citizen of the Dominican Republic who has been married since August 26, 1967, to Amparo Ortiz Frias, an American citizen. They have two children: Marian Frias, born in New York on June 7, 1968, and Reyes Frias, Jr., born in New York on February 2, 1973. (Adm. Rec. No. 19).

Mr. Frias testified at his deportation hearing on November 11, 1974, that he was a professional baseball player in the Dominican Republic and the United States from 1959 to 1968 (Adm. Rec. No. 14, at C-2), and asserted that he was well-known in the Dominican Republic. (Adm. Rec. No. 16, at 1). He supported the election of Juan Bosch to the Presidency of the Dominican Republic in 1963 (Adm. Rec. No. 16, at 1) and was a member of the Partido Revoluccionario Dominicano. (Adm. Rec. No. 14, at C-6). President Bosch was overthrown by a coup after seven months in office, and Mr. Frias fought in the armed forces seeking to return Bosch to power during the Revolution of 1965. (Adm. Rec. No. 14, at C-5; No. 16, at 1). He sustained a bullet wound in the head and had to leave the country as the revolution was suppressed. (Adm. Rec. No. 14, at C-4, C-5; No. 16, at 1). He played baseball in Puerto Rico, in the Spanish league in New York, and for a farm team of the St. Louis Cardinals in Albany, Georgia. (Adm. Rec. No. 14, at C-3—C-4).

In 1968, Mr. Frias was in Canada. When his right to stay there expired, he had nowhere to go but back to the Dominican Republic. (Adm. Rec. No. 44, at C-6). He stayed there only fifteen days, however, during which time he was subjected to continuous harassment and threats by the police to kill

him. (Adm. Rec. No. 14, at C-5—C-10). Mr. Frias managed to leave the country alive because he was able to acquire short-term protection and because he received assistance in acquiring a visa. He was able to do this only because his American-citizen wife was in the country, because he could pay $9,000 in bribes and because his only remaining established friend, Carlos Conielle, an official of the Dominican State Department, could channel these bribes appropriately. (Adm. Rec. No. 14, at C-7—C-10, C-13—C-14). Mr. Frias' safety was in jeopardy until the moment of his actual departure from the country. Mr. Conielle and his wife were required to accompany Mr. Frias to the airport to protect him, and at the airport Mr. Conielle told Mr. Frias he could guarantee his safety no longer. (Adm. Rec. No. 21, at C-7—C-9-13).

Following his exit from the Dominican Republic and entry into the United States on July 18, 1968, Mr. Frias was indicted on August 27, 1968. He was charged with violating 18 U.S.C. §1546 (fraudulent use of visas, permits), in that he had entered the United States using the documents ("green card") of one Rafiel Lara Ortiz, who is a permanent resident alien. (Adm. Rec. No. 23). He pleaded guilty in the United States District Court for the Eastern District of New York on September 4, 1973, and was sentenced by former Judge Anthony J. Travia to serve three years' incarceration. (Adm. Rec. No. 23).

During his incarceration, Mr. Frias learned of additional reasons to fear for his life because of political persecution if he returns to the Dominican Republic. On or about February 17, 1973, the Dominican Police executed Colonel Francisco Caamano Deno, Mr. Frias' commander in the

Bosch forces during the revolution of 1965. (Adm.Rec.No.16, at 1 and 2; No. 5, at 4). After Mr. Frias filed his application for withholding of deportation pursuant to Section 243(h) of the Act, he was informed by the Service that a homicide charge in the Dominican Republic, dismissed in 1965, has been reactivated. This charge had been dismissed after a finding by a court of self-defense. (Adm.Rec.No.14, at C-12). Mr. Frias was not arrested for this charge in 1968 when he was in the Dominican Republic.

On October 29, 1974, Mr. Frias was released from Danbury Federal Correctional Institution on parole to the custody of his immigration detainer. He was released upon payment of a $1,500 bond set by the Service on February 14, 1975. Mr. Frias now resides in New York with his American citizen wife and two children.

ISSUES PRESENTED

1. Did the Board of Immigration Appeals err in denying the petitioner's claim that his deportation is precluded by Section 241(f) of the Immigration and Nationality Act, 8 U.S.C. §1251(f) ?

2(a). Did the Board of Immigration Appeals err in failing to rule on the petitioner's claim that his deportation should be withheld for reasons of political persecution pursuant to Section 243(h) of the Act, 8 U.S.C. §1253(h) ?

2(b). Did the Immigration Judge err in denying petitioner's application for withholding of deportation for reasons of political persecution?

3. Did the Board of Immigration Appeals err in its decision by considering and relying upon unsubstantiated and prejudicial assertions not properly part of the record?

ARGUMENT

I. PETITIONER MEETS ALL THE REQUIREMENTS OF §241(f) OF THE IMMIGRATION AND NATIONALITY ACT, AND THE BOARD OF IMMIGRATION APPEALS THEREFORE ERRED IN DENYING HIM EXEMPTION FROM DEPORTATION UNDER THAT PROVISION.

Reyes Frias DeLeon came to the homeland of his American wife and two children in 1968 following politically motivated threats against his life by the police in the Dominican Republic. Mr. Frias procured entry into this country by fraud and misrepresentation of himself as one Rafiel Lara Ortiz, a permanent resident alien. On the basis of that fraudulent entry, Mr. Frias was subsequently convicted upon his plea of guilty of violating 18 U.S.C. §1546 (fraud in the use of entry documents). Since the Service has not asserted or proved that Mr. Frias was otherwise inadmissible at the time of that entry (or at his more recent, 1972 entry), he is a member of that group of persons whom Congress, by enacting Section 241(f) of the Act, exempted from deportation. Congress' purpose was to preserve the families of American citizens whose alien members had committed some fraud in order to be with them. See Reid v. I.N.S., 420 U.S. 619, 630 (1975).

The Immigration and Nationality Act, codified in 8 U.S.C. §1101 et seq., is the "basic statute dealing with Immigration and Nationality." 1 C. Gordon and H. Rosenfield, Immigration Law and Procedure 1-13 (rev. ed. 1975). Section 212 of the Act, 8 U.S.C. §1182, specifies various grounds for exclusion of certain aliens seeking admission to the United States; Section 241(a), 8 U.S.C. §1251(a), specifies grounds for deportation of certain aliens already in this country. Section 241 also contains

provisions limiting the application of subsection 241(a), one of which limitations is §241(f), the subsection whose scope is at issue here.

In order to be exempted from deportation by Section 241(f), the alien must (1) be the spouse, parent or child of a United States citizen or permanent resident alien, (2) be deportable because he or she was excludable at the time of entry as an alien "who ha[s] sought to procure or ha[s] procured visas or other documentation, or entry into the United States by fraud or misrepresentation," and (3) be otherwise admissible at time of entry. There are no other conditions or requirements, and the exemption from deportation (sometimes called a "waiver") is mandatory, not discretionary, where it applies.

The Board of Immigration Appeals rejected Mr. Frias' claim to a §241(f) exemption on two grounds. First, the opinion seems to say that §241(f) does not apply where the fraud on which deportation depends was committed not at the most recent entry into this country, but at some earlier entry. Second, the Board asserted that where deportation is not expressly premised on excludability under Act §212(a)(19), the §241(f) exemption cannot apply. In addition, the immigration judge in this case relied on yet another reason to deny the claim: that Mr. Frias' deportability arises "without regard to entry." Each of these three grounds is erroneous.

The Supreme Court has twice construed Section 241(f), first in I.N.S. v. Errico, 385 U.S. 214 (1966), and very recently in Reid v. I.N.S., 420 U.S. 619 (1975). Errico held that Section 241(f) applied to two aliens who were charged as deportable by the Service because they evaded quota restrictions under since-amended Section 211 of the Act, 8 U.S.C.

§1181(a) (1964 ed.). Errico received an immigrant preference by falsely posing as a skilled foreign car mechanic; Scott gained entrance through a fraudulent marriage to an American citizen and then gave birth to a child in the United States. Thus, Errico and Scott each gained entrance into this country by fraudulently claiming to be a different kind of alien from the kind each was. The Court in Errico held that although §241(f) tracked the language of §212(a)(19), which renders excludable those aliens who seek to enter the United States by fraud, §241(f) was "not to be applied . . . only when the alien is charged with entering in violation of §212(a)(19)." 385 U.S. at 217. The quota evasions charged by the Service against Errico and Scott were based on fraudulent misrepresentation, and the Court held that §241(f) waived a deportation charge resulting directly from fraud, regardless of the section of the statute under which the government brought the deportation charge.

Reid v. I.N.S., 420 U.S. 619 (1975), explicitly adhered to the holding in Errico, while explaining and narrowing some of its broad language. Id. at 630. In Reid, two aliens entered the United States posing as American citizens. Thus, in addition to entering fraudulently, they evaded inspection as aliens at entry. See 8 C.F.R., parts 234-235. The Service charged the Reids as deportable under §241(a)(2), for entering without inspection. The Court held that the Reids were not exempted from deportation by Section 241(f), because this charge under Section 241(a)(2) "did not depend in any way upon the fact than an alien was excludable at the time of his entry on one of the grounds specified in §212(a)." 420 U.S. at 623. The Court held that evasion of inspection by falsely claiming American citizen-

ship "so significantly frustrate[s] the process" that it can be said that the alien did more than commit fraud. Id. at 624.

The Immigration and Naturalization Service in this case seeks to deport Mr. Frias pursuant to Section 241(a)(5), 8 U.S.C. §1251(a)(5), because he was convicted under the third paragraph of 18 U.S.C. §1546.[4/] Mr. Frias was indicted for and pleaded guilty to impersonating Rafiel Lara Ortiz, a permanent resident alien, when applying for admission into the United States. Mr. Frias admittedly sought "to enter the United States, by fraud, or by wilfully misrepresenting a material fact"; Act §212(a)(19), 8 U.S.C. §1182(a)(19), in that he, in the words of the indictment, "when applying for admission into the United States, impersonated one Rafiel Lara Ortiz . . . by appearing under the assumed name of Rafiel Lara Ortiz, without disclosing his true identity." (Adm. Rec. No. 23; No. 11 at 2).[5/]

A. The "Conviction" Error

The reasoning of the immigration judge in his opinion following the deportation hearing that "the ch[a]rge under Section 241(a)(5), [8] U.S.C. §1251(a)(5), is one without regard to entry" is erroneous in this case. Violations of non-entry-related alien registration requirements may also bring an alien within the provisions of §241(a)(5),[6/] but the facts under-

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[4/] Other parts of 18 U.S.C. §1546 penalize misuses of immigration documents not necessarily related to entry. Mr. Frias' conviction, however, was for use at entry of another alien's "green card."

[5/] The comment by the Board of Immigration Appeals that "[t]here is nothing to indicate that his entry into the United States or his obtaining the entry document involved fraud or misrepresentation," (Adm. Rec. No. 3, at 2), flies in the face of the uncontroverted and uncontested facts of the case and is clearly erroneous.

[6/] See Bufalino v. I.N.S., 473 F.2d 728 (3rd Cir.), cert. denied, 412 U.S. 928 (1973). Mr. Frias has not been charged with any such omission.

lying Mr. Frias' conviction (and deportation order) entirely relate to a fraud committed at entry. The fact of a conviction often has consequences under the Immigration and Nationality Act. But this court has held that mere proof of a conviction, without examination of its substance, is not necessarily enough to establish excludability. Lennon v. I.N.S., No. 74-2189 (2d Cir., Oct. 7, 1975), slip op. 139. In Lennon, this court looked behind a marijuana conviction to determine if the intent of Congress would be fulfilled by deporting an alien convicted under a statute with no requirement of mens rea. Here, behind the uninformative fact of conviction is no more than an alien who committed fraud at entry and was punished for it. It is that fraud alone which in substance brings him within the provisions of §241(a)(5) in this case. Unlike evasion of inspection, Mr. Frias' conviction added no "frustration" to the process beyond the original fraud, and he should have been exempted from deportation.

B. The "Prior Entry" Error

The Board of Immigration Appeals and the Immigration Judge apparently thought that Section 241(f) did not apply to Mr. Frias because his conviction for violation of 18 U.S.C. §1546 related to a 1968 entry, while his most recent entry, as stated in the Order to Show Cause, was in 1972. There is no support for this novel limitation, either in the language of the statute or in its legislative history. Section 241(f) speaks in the past tense--"aliens who have sought to procure or have procured . . . "-- and thus clearly contemplates application to entries prior to the most recent one.

The narrow construction applied by the Board and the Service also fails because once Mr. Frias procured entry by fraud in 1968, he remained

excludable, as an alien who "has procured a visa or other documentation, or seeks to enter the United States by fraud or by wilfully misrepresenting a material fact." Section 212(a)(19), 8 U.S.C. §1182(a)(19). If he misrepresented a material fact in 1968 (as he admitted in pleading guilty in 1973), then at his most recent entry in 1972 he was still excludable as an alien who "has procured . . . documentation . . . to enter the United States . . . by wilfully misrepresenting a material fact." Id. So far as the record reveals, he was otherwise admissible in 1972, and thus is eligible for the exemption from deportation afforded by §241(f).

C. The Erroneous Application of "Reid"

Mr. Frias' claim to the applicability of Section 241(f) is supported both by the restrictive language of Reid and by this Court's interpretation of Reid in Pereira-Barreira v. I.N.S., 523 F.2d 503 (2d Cir. 1975). In that case, an alien sought to invoke §241(f) to prevent deportation on grounds of overstaying his visitor's visa. His only fraud, however, had been in obtaining an adjustment of status while within the United States. This court held that because an adjustment of status is not an "entry," §241(f) did not apply. In both Reid and Pereira-Barreira, the ground charged for deportation was §241(a)(2), which "does not depend in any way upon the fact that an alien was excludable at the time of his entry on one of the grounds specified in §212(a)." 523 F.2d at 508, quoting Reid, 420 U.S. at 623. Mr. Frias' conviction, by contrast, is entirely dependent on the fact that he was excludable at time of entry, because he entered by misrepresenting a material fact about himself. The Board of Immigration

Appeals applied a far too narrow and overly simplistic construction of Reid: "He is not charged with being deportable by reason of inadmissibility at entry under Section 212(a)(19). Hence, he does not benefit from Section 241(f), Reid v. I.N.S." (Adm. Rec. No. 3, at 2). This statement is incompatible with Reid's interpretation of Errico. As this court noted in Pereira-Barreira:

> The essence of Errico, as interpreted by Reid, is that aliens deportable under Section 212(a)(19) should not be deprived of the waiver provision of Section 241(f) by the I.N.S.'s decision to rely on another section for the deportation.

523 F.2d at 508 n.5.[7/] Mr. Frias' situation is "substantially equivalent" to that of Errico and Scott, 523 F.2d at 508, and quite unlike that of the Reids.

Like Errico and Scott, Mr. Frias procured entry into the United States by posing as a different kind of alien than he actually was. He did not evade inspection; an alien presenting a "green card" as he did is subject to inspection. 8 C.F.R. §235.1(d). See Goon Mee Heung v. I.N.S., 380 F.2d 236, 237 (1st Cir.), cert. denied, 389 U.S. 975 (1967), quoted at length in Reid, 420 U.S. at 624-25. Mr. Frias comes even more clearly with the group for whom Congress designed the exemption than did the Errico petitioners. Unlike the Reids, Scott and Errico (and also unlike Pereira-Barreira), Mr. Frias did not suddenly develop a familial relationship to

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[7/] While Reid and Pereira-Barreira virtually foreclose the possibility of applying §241(f) to a deportation sought under §241(a)(2), those cases do not address the question raised here, where deportation is based on a clause of §241(a)(5) which depends entirely upon the commission of fraud at entry. By its terms, §241(f) applies to the "provisions" of §241. The plural would not have been used if the protections of §241(f) could only be invoked in a proceeding brought under §241(a)(1), as in Errico. See Reid, 420 U.S. at 626.

American citizens after his fraudulent entry; he entered the United States to rejoin his already established family of American citizens. He has been married to his wife since 1967. (Adm. Rec. No. 19). Their first child, Marian, was born June 7, 1968, before Mr. Frias' fraudulent entry that July.[8/]

Here, just as in Errico, no specific ground of excludability was charged against petitioner. In both cases, "the obviously available provisions of §212(a)(19) relating to the fraudulent procurement of . . . entry," Reid, 420 U.S. at 630, were avoided by the Service. As in Errico, Mr. Frias is in a "substantially equivalent" position to one expressly charged as excludable under §212(a)(19), Pereira-Barreira, 523 F.2d at 508, and he is entitled to the application of the §241(f) exemption.

* * *

Accordingly, this court should grant the petition for review; reverse the decision of the Board of Immigration Appeals; vacate the order of deportation; and dismiss the deportation proceedings against Mr. Frias.

[8/] Moreover, Mr. Frias is exactly the kind of alien for whom the Supreme Court has said Congress especially designed this provision: "to prevent the deportation of refugees from totalitarian nations for harmless misrepresentations made solely to escape persecution." Reid, 420 U.S. at 630-31 n.8. Cf. Part II infra.

II. THE DEPORTATION OF MR. FRIAS SHOULD HAVE BEEN WITHHELD, PURSUANT TO SECTION 243(h) OF THE ACT, BECAUSE HE WILL BE SUBJECT TO POLITICAL PERSECUTION IF HE IS DEPORTED TO THE DOMINICAN REPUBLIC.

A. The Board of Immigration Appeals Abused its Discretion by Failing to Rule on Mr. Frias' Appeal from the Denial of his Application for Withholding of Deportation.

Mr. Frias submitted, by his affidavit and his own sworn testimony, particularized evidence that he fears for his life if he is deported to the Dominican Republic. His fears are based on concrete threats by the police who opposed a revolution in which he fought and by a reactivation of a once-dismissed, eleven year old homicide charge. The charge was dismissed in 1965 when Mr. Frias established to the satisfaction of a court that he acted in self defense. It was not mentioned, much less asserted against him when he was in the Dominican Republic briefly in 1968. He learned of its reactivation only after he submitted papers to the Service proclaiming his political opposition to the present Dominican regime and claiming he would be persecuted if deported there.

The appeal of the §243(h) claim was included in the Notice of Appeal to the Board of Immigration Appeals filed by counsel on December 30, 1974. (Adm. Rec. No. 10). Counsel presented argument on the §243(h) claim before the Board, although the Board asked no questions on that subject. (Adm. Rec. No. 5, at 2-6). Counsel briefed the issue in writing. (Adm. Rec. No. 4, at 8-11).

However, the Board made no mention of the §243(h) claim in its decision. The Application on the heading of the decision lists only the §241(f) claim,

despite the fact that the transcript of argument lists both the §241(f) and §243(h) claims. (Adm. Rec. No. 3, at 1; Adm. Rec. No. 5, at 1). The first paragraph of the decision notes that the appeal is from the order finding the respondent deportable, "denying his application for voluntary departure,[9/] denying application for withholding of deportation under section 243(h) . . . ." But the Board never mentions the claim again.

Appeals lie to the Board of Immigration Appeals from decisions in deportation cases as provided in 8 C.F.R. §242.21 and 8 C.F.R. §3.1(b)(2). "[I]n considering and determining cases before it as provided in this part the Board shall exercise such discretion and authority conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case." 8 C.F.R. §3.1(d). (Emphasis added). An appeal from denial of an application for withholding was clearly within the Board's mandatory jurisdiction. Only a decision by the Board can permit meaningful review by this court. See Foti v. I.N.S., 375 U.S. 217, 228, 230 n.16 (1963).

The Board granted oral argument and did not issue a summary dismissal as permitted by 8 C.F.R. §3.1(d)(1-a). The Board failed to exercise its mandatory grant of discretion to dispose of the case and thus abused its discretion. Where there has been a failure to exercise discretion, the Court should remand for a decision by the Board of Immigration Appeals. LaFranca v. I.N.S., 413 F.2d 686, 690 (2d Cir. 1969), quoting Judge Frank's opinion in United States ex rel. Adel v. Shaughnessy, 183 F.2d 371, 372 (2d Cir. 1950).

[9/] No such application was made. The Immigration Judge raised and denied the issue sua sponte.

B. The Immigration Judge Erred in Concluding that the Evidence Presented By Mr. Frias was Insufficient to Sustain a Persecution Claim.

The immigration judge based his legal conclusion on Mr. Frias' persecution claim on what purported to be a recitation of the facts in the record. However, his recitation of the facts contains multiple material misstatements and mischaracterizations of the facts in evidence. The decision is arbitrary and an abuse of the discretionary power delegated to the immigration judge to fairly consider the case. He appears to require a greater standard of evidence than that applied by the courts based on agency practice and Congressional intent, and he did not apply the accepted standards for evaluating the facts.

The immigration judge stated that Mr. Frias "presented no specific evidence as to the extent of his involvement in political activity in the Dominican Republic at any time." (Adm. Rec. No. 11, at 2-3). To the contrary, Mr. Frias presented his affidavit that he supported the election of Juan Bosch in 1963 and served in the military forces under Colonel Francisco Caamano Deno fighting to return Bosch to power in 1965, receiving a bullet wound in the head. (Adm. Rec. No. 16, at 1). He also testified that he was a member of Bosch's party--the Partido Revoluccionario Dominicano (Adm. Rec. No. 14, at C-6), and reiterated his participation in the armed forces. (Adm. Rec. No. 14, at C-4, C-5).

The immigration judge mentioned that Mr. Frias played professional baseball with a minor league club in Albany, Georgia, but neglected to mention Mr. Frias' career in the Dominican Republic. (Adm. Rec. No. 14, at C-3). This detail adds weight to Mr. Frias' testimony that he was known in the

Dominican Republic, and that he appeared in the newspapers (Adm.Rec.No.14, at C-9). Mr. Frias did not claim, as the immigration judge characterized it, "widespread popularity." (Adm.Rec.No. 11, at 3).

The immigration judge discounted Mr. Frias' claims of harassment and fear of persecution because of what he claimed was Mr. Frias' "insistence that he went to the Dominican Republic voluntarily from Canada" and had his wife meet him there from the United States. (Adm.Rec.No. 11, at 3). Mr. Frias testified he did not want to go to the Dominican Republic; his permit to remain in Canada expired, and since he had no American visa, the Dominican Republic was the only place he could go. (Adm.Rec.No.14, at C-6). His wife came because her American citizenship might help him get a visa from the American Consulate (Adm.Rec.No.14, at C-13 to C-14).

The immigration judge stated that Mr. Frias' description of harassment "hardly adds up to persecution." (Adm.Rec.No.11, at 4). The testimony of Mr. Frias relating to the "so-called harassment" (Id.) consists in part of the following statements about his 15 days in the Dominican Republic in 1968:

> Yes, we had very many problems. A friend of mine who is very important person there and who was the godfather of my daughter took me personally to the airport because they [the Police Department] wanted to kill me.

(Adm.Rec.No. 14, at C-5).

> [H]e [the friend, Carlos Conielle] told me in case the police came, and [h]e knew the police were trying to come, I should not go out but I should call him right away by phone and I shouldn't leave the hotel, or my wife or my child, we should all stay there. During the fifteen days I remained there almost every day I had problems. Altogether there were about twenty

> people came, to talk to me and to ask me to go with them and whenever someone came, like a police inspector, I right away call my friend and he will talk to them and then they won't pick us up. This was almost every day. Until the very last day when my friend told us it is going to be very difficult for us to remain longer there, he went himself to the Consulate, and he told them they are going to kill us and he got a visa for my wife and for me and he took us to the airport and we got away.

(Id., at C-8).

> And at this time, I had $7,000 of my own and I had to pawn $2,000 that I had in jewelry, altogether $9,000. And all this money was given to the different people just described for so they should let me go home. And this is why my friend told me I cannot help you, you have to leave this country. It was fifteen days of a terrible life and I suffered very much, and then I had to leave. The only thing in fact that saved my life was the money I had then.

(Id., at C-9).

The immigration judge mischaracterized Mr. Frias' escape from the Dominican Republic by misstating the facts. "The picture drawn by the respondent of being a fugitive does not square with being taken to the airport by a high ranking official, in the company of a Police Captain who also assisted him." (Adm.Rec.No.11, at 4). The uncontradicted testimony of Mr. Frias was not that the police captain came to the air ort, but that Mr. Frias channeled a substantial bribe to the captain to obtain documents that would enable him to leave the Dominican Republic for the United States. (Id., at C-13). Mr. Frias' uncontradicted testimony lends no support to the picture of a triumphal airport procession conjured up by the immigration judge:

> Because they [Mr. and Mrs. Conielle] were worried that during the trip from the hotel to the airport they would find and kill me and they remained with me all the time until I went into the plane, and until after I went, and until after the plane left.

(Adm. Rec. No. 11, at C-13).

Curiously, the only "testimony" the immigration judge found specific in contrast to the foregoing has to do with the reactivated homicide charge against Mr. Frias. However, what he credited was the unsworn questions asked on cross-examination by the Service trial attorney: "he was arrested and before the prosecution could be completed, he fled the country." (Adm. Rec. No. 11, at 5). There was no testimony or evidence in the record as to this "fact." The questions of counsel are not evidence. The only evidence on the record is Mr. Frias' testimony that "I was 24 days in prison and the charge against me was dismissed." (Adm. Rec. No. 14, at C-12).

Mr. Frias could not offer better evidence than his sworn testimony because of the nature of the claims he is making. No documentary proof of his service in the revolutionary army of Juan Bosch is available from the present government of the Dominican Republic. Mr. Frias has only his bullet scar as physical proof. Mr. Frias cannot possibly obtain documents showing that his 11 year-old dismissed homicide charge has been reopened because the government of the Dominican Republic wishes to punish him for his past political activity and present views. Where no other evidence is available, the detailed testimony of the applicant, if clear, consistent, and credible, is sufficient. See In re Sihasale, 11 I & N Dec. 531 (BIA 1966); cf. Kovac v. I.N.S., 407 F.2d 102 (9th Cir. 1969).

Congress, in amending Section 243(h) in 1965, to omit "physical" as a modifier of persecution was concerned that the burden of proof on the alien not be unreasonably heavy. Congressman Poff, speaking in favor of the amendment, stated: "The clause 'physical persecution' is entirely too narrow. It is almost impossible for the alien under the order of deportation to assembly the quantum of evidence necessary to discharge his burden of proof." 111 Cong. Rec., pt. 16, at 21804 (August 25, 1965). In their treatise, Immigration Law & Procedure, Gordon & Rosenfield speak of the applicant having the burden of establishing the "likelihood" of persecution. §8,17b at 8-115; §5.16b at 5-124.

The Board of Immigration Appeals itself set forth a twofold standard for evaluating the facts and circumstances of a §243(h) claim: (1) was the departure of the alien from the country politically motivated; and (2) are the consequences facing the respondent upon return political in nature? See In re Janus and Janek; 12 I & N Dec. 866 (1968); see also In re Dunar, Int. Dec. 2192 (BIA, 1973), Mr. Frias established his claim, meeting both of these requirements. Mr. Frias left the Dominican Republic twice for political reasons. In 1965 he left as the Revolution was being suppressed, after receiving a head wound fighting for the revolutionary army. In 1968 he left because the police threatened and harassed him for his well-known role in fighting them in the Revolution.

His former commanding officer was killed by these same police during 1973. (Adm. Rec. No. 16, at 1, 2). If Mr. Frias is returned to the Dominican Republic he will face prosecution on an eleven-year-old homicide charge, formerly dismissed and only recently reopened in the light of his

application for withholding of deportation. This will be a political prosecution. In Kovac v. I.N.S., 407 F.2d 102 (9th Cir. 1969), the Court of Appeals found that a Yugoslav sailor who jumped ship and faced prosecution in Yuglslavia for desertion of his ship would suffer persecution because of his political beliefs, although the charge he faced was criminal in nature. Any prosecution of Mr. Frias on his reactivated homicide charge would be just as political as the charge Kovac faced.

* * *

Mr. Frias presented particularized evidence of imminent persecution because of his political beliefs should he be deported to the Dominican Republic. This evidence was sufficient to satisfy an immigration judge who fairly considered the evidence, as contemplated by 8 C.F.R. §242.17(c).

In sum, there is not "reasonable, substantial, and probative evidence on the record considered as a whole" to support the decision of the immigration judge. §106(a)(4) of the Act; 8 U.S.C. §1105a(a)(4). Both the Board and the immigration judge abused their discretion and the application for withholding of deportation should have been granted. This court should reverse the order of the Board of Immigration Appeals dismissing Mr. Frias' appeal.

III. THE BOARD OF IMMIGRATION APPEALS ERRONEOUSLY CONSIDERED AND RELIED ON UNSUBSTANTIATED AND PREJUDICIAL ASSERTIONS WHICH WERE NOT OFFERED OR ADMITTED IN EVIDENCE, IN VIOLATION OF PETITIONER'S RIGHTS TO A FAIR HEARING.

At his deportation hearing, Reyes Frias DeLeon was charged with being deportable because of a conviction for immigration fraud. He submitted papers answering this charge, which, while admitting his conviction, claimed his deportation was precluded by Section 241(f) of the Act. In the alternative, Mr. Frias claimed a right to withholding of deportation because of political persecution, under Act §243(h). At the original hearing both these claims were denied. On appeal the Board of Immigration Appeals denied Mr. Frias' §241(f) claim and failed to rule on his application for withholding of deportation.

The decision of the Board of Immigration Appeals depends in part on purported facts which are not part of the evidence in this record. The source of these unsubstantiated and materially prejudicial assertions seems to be an ex parte letter from District Director James E. Smith of the Immigration and Naturalization Service to the State Department. (Adm. Rec. No. 15). Most of this letter consists of matters which were never offered, much less admitted, into evidence at the deportation hearing. As a result, Mr. Frias was wholly deprived of any opportunity to contest, rebut or even object to these erroneous "facts." For this reason alone, the decision below must be reversed.

The only apparent purpose of Mr. Smith's letter was to obtain an opinion from the State Department as to whether Mr. Frias would likely be subject to persecution if he were deported to the Dominican Republic. The

letter was not (nor could it have been) competent evidence of the matters asserted therein. Yet the Board of Immigration Appeals relied on baseless assertions in the letter to support its decision. Mr. Smith's letter states that Mr. Frias was convicted for entry posing as a citizen. The Board apparently accepted this bald and untrue assertion, for its opinion explicitly refers to a purported "claim to U.S. citizenship" at the time of Mr. Frias' entry. (Adm. Rec. No. 3, at 2). The only place in all the papers, argument, or record of this case where it is stated that Mr. Frias claimed to be a U.S. citizen at the time of entry is in Mr. Smith's letter. At oral argument before the Board, counsel expressly pointed out that there was no evidence of a claim to citizenship in the record and was uncontradicted throughout the proceedings. (Adm. Rec. No. 5, at 6). Mr. Frias reiterated in his brief to the Board that he entered by presenting the documents ("green card") of a permanent resident alien. (Adm. Rec. No. 4, at 2) The indictment itself states that the person Mr. Frias impersonated was Rafiel Lara Ortiz. (Adm. Rec. No. 23). The significant prejudicial effect of this erroneous assertion cannot be doubted. A false claim to citizenship at entry virtually precludes the application of §241(f). See Part I supra.[10/]

Mr. Smith's letter goes on to discuss a purported arrest and conviction record for Mr. Frias. Proof of a sufficiently serious record might have tended to show that Mr. Frias was not "otherwise admissible" at the time of his 1968 entry. See Act §§212(a)(9), (10), (23). He might then have

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10/ Mr. Smith's letter also erroneously states that Mr. Frias was charged with violating 18 U.S.C. §1546 in 1969, pled guilty on February 27, 1969, failed to appear for sentencing, and that subsequently a fugitive warrant was issued. In fact, Mr. Frias was indicted on the §1546 charge on (cont'd next page)

been ineligible for a §241(f) exemption from deportation. The Service was explicitly given time by the Immigration Judge to introduce evidence of convictions for this reason, but it failed to do so. (Adm. Rec. No. 12, at 1-A to 1-B; No. 10, at 1).

None of these important allegations relating to citizenship or a criminal record was at any time proved by the Service. Moreover, since neither the letter not the matters asserted in it were tendered for admission or admitted at the deportation hearing, Mr. Frias wasn't given an opportunity to object to or rebut any of the erroneous hearsay. This is a clear violation of the Act, §242(b)(3), 8 U.S.C. §1252(b)(3), which requires that an alien facing deportation be given "a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government." See also Id., §1252(b)(4); 8 C.F.R. §242.16(a); cf. 8 C.F.R. §242.16(d), 103.2(b)(2).

The unreliable and prejudicial hearsay contained in this letter, much of it shown by the record itself to be inaccurate, was improperly relied on by the Board of Immigration Appeals. It should not be before this Court. Schley v. Pullman's Palace Car Co., 120 U.S. 575, 578 (1887). A deportation decision may be based only on the evidence. Cheng Fan Kwok v. I.N.S., 392 U.S. 206, 209 (1968); Woodby v. I.N.S., 385 U.S. 276 (1966). Anything less would be a gross denial of due process. See Yamataya v. Fisher, 189 U.S. 86, 100-01 (1903)(Harlan, J.). This case should be reversed for this reason alone. Mr. Frias asserted he entered as a permanent resident alien, not as a citizen.

10/ (footnote from preceding page cont'd) August 27, 1968, and was convicted on his plea of guilty on September 4, 1973. Nothing relating to a fugitive warrant appears in the record.

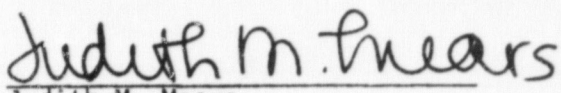
The Service presented no evidence to the contrary. If the decision of the Board is not reversed, the case must at least be remanded for the presentation of competent evidence on which a new decision may be based.

CONCLUSION

Mr. Frias is exempted from deportation on the charge asserted by virtue of §241(f) of the Immigration and Nationality Act. This Court should grant the petition for review, reverse the decision of the Board of Immigration Appeals, vacate the order of deportation, and dismiss the deportation proceedings against Mr. Frias. If the decision is not reversed on this ground, it should at least be vacated and remanded for presentation by the Service of competent evidence.

If this court holds that Mr. Frias cannot benefit from the exemption provided in §241(f) of the Act, the court should reverse the order of the Board of Immigration Appeals dismissing the appeal as to the application for withholding of deportation under §243(h) of the Act. The evidence on this record was sufficient to sustain a persecution claim, and the decision of the immigration judge was not supported by reasonable, substantial and probative evidence on the record as a whole. At least, the court should reverse the order of the Board of Immigration Appeals and remand the case for an express ruling by the Board on Mr. Frias' withholding claim.

Respectfully submitted,



Judith M. Mears
Dennis E. Curtis
Stephen Wizner
Mary F. Keller
127 Wall Street
New Haven, Connecticut 06520
(203) 436-2210

Michael J. Churgin
2500 Red River
Austin, Texas 78705

Attorneys for Petitioner

On the Brief:

Anna M. Durbin
Yale Law School
Class of 1976

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Petitioner were mailed to Mary P. MaGuire, Special Assistant United States Attorney, 1 St. Andrews Plaza, New York, New York 10007, this 2nd day of February, 1976.

Judith M. Mears

Judith M. Mears, Esq.
Commissioner of the Superior
Court, State of Connecticut

ADDENDUM

RELEVANT STATUTES

8 U.S.C. §1182(a)(19). Excludable aliens--General classes

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

. . . .

(19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact;

. . . .

8 U.S.C. §1251(a)(5). Deportable aliens--General classes

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who--

. . . .

(5) has failed to comply with the provisions of section 1305 of this title unless he establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful, or has been convicted under section 1306(c) of this title, or under section 36(c) of the Alien Registration Act, 1940, or has been convicted of violating or conspiracy to violate any provision of sections 611 to 621 of Title 22, or has been convicted under section 1546 of Title 18;

. . . .

8 U.S.C. §1251(f). Deportable aliens--General classes Relationship to United States citizen or lawfully admitted alien as affecting deportation for fraudulent entry

. . . .

(f) The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or

misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence.

8 U.S.C. §1252(b)(3),(4). Apprehension and deportation of aliens--Arrest and custody; review of determination by court

. . . .

(b) . . . . Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not consistent with this chapter, as the Attorney General shall prescribe. Such regulations shall include requirements that--

. . . .

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section . . . .

. . . .

8 U.S.C. §1253(h). Countries to which aliens shall be deported--Acceptance by designated country; deportation upon non-acceptance by country. Withholding of deportation

. . . .

(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

18 U.S.C. §1546. Fraud and misuse of visas, permits, and other entry documents

. . . .

Whoever, when applying for an immigrant or nonimmigrant visa, permit,

or other document required for entry into the United States, or for admission to the United States personates another, or falsely appears in the name of a deceased individual, or evades or attempts to evade the immigration laws by appearing under an assumed or fictitious name without disclosing his true identity, or sells or otherwise disposes of, or offers to sell or otherwise dispose of, or utters, such visa, permit, or other document, to any person not authorized by law to receive such document;

. . .

. . . .

Shall be fined not more than $2,000 or imprisoned not more than five years or both.